No. 5985

IN THE

United States
Circuit Court of Appeals

FOR THE

Ninth Circuit

MARBLE E. BURCH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Brief for Appellant

HUSTON, HUSTON AND HUSTON,
and PERCY NAPTON,
Woodland, California,
Attorneys for Appellant.

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MARBLE E. BURCH,
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BRIEF OF APPELLANT

The names of the parties to this suit appear above and a brief statement of the facts in the pleadings is as follows:

Complainant alleges the residence of the appellant, Burch, within the territorial limits of the jurisdiction of the Northern Division of the United States District Court for the Northern District of California, Second Division.

That the appellee at all times mentioned in the Complaint was and is now the owner of all the Government lands embraced in Township 30 N., Range 7 E. M. D. & M., and also Section 2 in said Township, Range and Meridian.

That all the land aforesaid is situate in the Lassen National Forest in Lassen County, State of California, and Northern District thereof.

That by virtue of an Act of Congress the above described lands were during the year 1902 withdrawn as the Lassen Peak and Diamond Mountain Forest Reserves and were during the year 1907 included within the Lassen Peak National Forest and later within the Lassen National Forest and of which the said land at all times mentioned in the complaint were and now are a part of said Lassen National Forest.

That the appellee intends to build a road through Section 2 aforesaid on the east side of Silver Lake between the east bank or shore line of said lake and the east section line of said section and that Silver Lake is in Section 2 aforesaid.

That the appellant constructed a fence and maintains the same on the public domain over which the proposed road will be built and that his said fence interferes with the construction of the proposed road.

That the appellee is desirous of constructing said road at once, the same being necessary for the administration of the Lassen National Forest.

Appellee prays for an order of Court commanding that appellant remove his said fence and that he, his agents, et al., be perpetually enjoined from interfering with the construction of said proposed road.

ANSWER OF APPELLANT

The answer of the appellant admits that he resides within the territorial limits of the jurisdiction of the Court.

That appellee is the owner of Section 2, Township 30 N., Range 7 E., M. D. M., and that Section 2 is a part of the Lassen National Forest.

That appellee intends to build a road through Section 2 aforesaid on the east side of Silver Lake between the east bank or shore line of said Section 2, but in connection with his said admission, the appellant avers that the road as proposed will run over, upon and through appellant's land, namely Lots 3 and 4 and South one half of Northwest one quarter (S½ of NW¼) of Section 1, Township 30 N., Range 7 East M. D. M. containing 159.22 acres and concerning which land at all times mentioned in the complaint and for a long time prior thereto, he was and now is the owner of and in possession of.

Appellant denies that at the times mentioned in the complaint or at any other time or at all his said lands formed or form a part or parcel of any Government lands.

Appellant also denies that he constructed, maintained or maintains upon or across the public domain of the United States of America or upon or across any land or lands of forest Reserve or Reserve of the United States or upon or across any National Reserve or at all a fence or otherwise or at all.

In brief, appellant denies that he has constructed, maintained or maintains a fence upon any land of the appellee but instead the fence by him constructed and maintained is upon and across his land.

Appellant denies that his fence prevents or obstructs or will do so at any time, the building of the proposed road on part of appellee.

As to whether the appellee is desirous of constructing said road at once, or at any other time or at all, appellant has no knowledge, sufficient to enable him to answer the allegations, and basing his denial upon that ground denies the same.

To the Bill of Complaint the appellant interposed a Cross-Bill of Complaint wherein he sets forth the usual and ordinary allegations in a suit to quiet title to land.

Appellant concludes his Cross-complaint with the usual prayer respecting suits to quiet title.

In this suit the plain issue is, Is appellant's fence upon his own land or upon the land of the Government? In determining this homely question the west and north boundary lines of appellant's land become involved.

APPELLEE FAILED TO SUSTAIN THE BURDEN OF PROOF.

The burden of proving that appellant's fence is upon Government land rested upon the shoulders of the appellee throughout the trial of this suit.

This burden the appellee failed to sustain and in connection therewith, we invite the Court's attention to our first assignment of error. (Tr., page 39.)

APPELLANT'S MOTION FOR A JUDGMENT

At the conclusion of appellee's case the appellant moved the Court that a judgment be had in favor of appellant and in denying appellant's motion for a judgment we assert the Court committed error. (Tr., page 39.)

The appellant's motion is as follows:

> MR. NAPTON: At this time we ask that judgment be entered for defendant for the reason that they have not proven the allegations in their complaint. The burden in this case is upon the Government and I believe that on the pleadings the issue is whether or not this man's fence is upon the public domain or is upon land of the forest reserve, and the evidence does not show it at this time. I think there is a total failure of proof.
>
> THE COURT: That is the only evidence before the Court right now. They say it is upon Government land. Motion denied.
>
> MR. NAPTON: Exception. (Tr., page 39.)

APPELLEE'S PROOF

We will now proceed to discuss the substance of the proof upon which the appellee relies to sustain the burden imposed on it by its declaration.

Plaintiff introduced in evidence the map upon which defendant's title is based. (Plaintiff's Exhibit No. 1, Tr., 66.)

Plaintiff also introduced a certified copy of the Sandow Field Notes, and from which was prepared the much discussed map in this suit. (Plaintiff's Exhibit No. 2, Tr., 66.)

W. G. Durbin, a witness on behalf of appellee and the Forest Supervisor of the Lassen National Forest was shown a recent map of the recreational land laid around Sylvan Lake by the Forest Service in Township 30, Range 7 and 31-7.

He testified that the Government desired to build a road around the east side of said lake.

John C. Inge another witness for appellee, testified that he was the Registrar of the U. S. Land Office, Sacramento, California. He was shown appellee's Exhibit No. 1. He also testified that the survey of Township 30 N. Range 7 East, was approved July 11, 1883, made by the U. S. Surveyor General, San Francisco, California, and which was a copy of an official Government map and made by W. H. Brown, the Surveyor General, and that patents of land in Lassen Park were granted in reference to that map and a patent contains a reference to that plat and survey as recommended to the General Land Office by the U. S. Surveyor General and that Section 2, Township 30 N., Range 7 East, M. D. B. & M., according to the patent books of the U. S. Land Office is within the Lassen National Forest and the records show that to be within the Lassen National Forest. That the tract book concerning which he was testifying was the official tract book of Township 30 N., Range 7 E. M. D. B. & M., and shows the land was withdrawn November 22, 1902, and made permanent June 2, 1905.

It is within the Lassen National Forest according to the map, and the tract book is a part of the record of the U. S. Land Office in Sacramento, and that so far as Section 2 is concerned that it is all forest land no entries under it.

The appellee then introduced in evidence a certified copy of Field Notes of Sandow. (Exhibit No. 2, Tr., 66.)

The foregoing is the sum total of appellee's proof and upon which it relies to support the erroneous judg-

ment herein and by which it means and intends to take from appellant his right of ownership and possession in and to a certain portion of his land and as an incident thereto divest him of his right to a reasonable use of the water of Sylvan Lake for the purpose of watering his domestic animals and for other domestic purposes.

If this Court permits the erroneous judgment to stand said Judgment will, owing to its dualistic nature, deprive appellant of the two inherent rights by us discussed above.

The witnesses for appellee did not testify that appellant's fence was or is upon Government land or upon any part or portion thereof, and such a legal inference is not deducible from the documentary proof offered by plaintiff or through, or by means of any presumption set in motion by the evidence in this suit.

It is not and never was the contention of appellee that lying between Sections 1 and 2, Township 30 N., R. 7 East, M. D. B. & M., there is a fraction or a strip of vacant land upon which the appellant built and maintains a fence.

The aforesaid Sections are adjacent and it is not contended by the appellee that appellant constructed and maintains a fence upon land to which he intends or intended to acquire title.

The appellee alleges that the fence is upon Government land and the appellant defends against the allegation with the statement that the fence is upon his land and in the event of the Government building the proposed road, that is to say, on the east side of Silver

John C. Inge another witnes for appellee, testified at he was the Registrar of the U. S. Land Office, Sacmento, California. He was shwn appellee's Exhibit . 1. He also testified that th survey of Township N. Range 7 East, was approvd July 11, 1883, made the U. S. Surveyor General San Francisco, Calirnia, and which was a copy of n official Government ap and made by W. H. Brown, he Surveyor General, d that patents of land in Lasen Park were granted reference to that map and a patent contains a refence to that plat and survey a recommended to the neral Land Office by the U. S. Surveyor General and t Section 2, Township 30 N. Range 7 East, M. D. & M., according to the patet books of the U. S. nd Office is within the Lasse National Forest and records show that to be with the Lassen National rest. That the tract book coerning which he was tifying was the official tract book of Township 30 Range 7 E. M. D. B. & M., ad shows the land was thdrawn November 22, 1902, nd made permanent ne 2, 1905.

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If this Court permits the erroneous judgment to stand said Judgment will owing to its drastic nature, deprive appellant of the ... inherent rights by us discussed above.

The witnesses for appellee did not testify that appellant's fence was or is on Government land or upon any part or portion thereof, and such a legal inference is not deducible from the documentary proof offered by plaintiff or through, or by means of any presumption set in motion by the evidence in this suit.

It is not and never was the contention of appellee that lying between Sections 1 and 2, Township 36 N., R. 7 East, M. D. B. & M., there is a fraction or a strip of vacant land upon which the appellant built and maintains a fence.

The ... adjacent and ... appellee ... N¼ of ... M. D. M., ... any portion

Lake between the east bank or shore line of said Section 2, that the carrying out of such act on the part of appellee will carve a slice from his estate in fee and commence—as to the portion carved out—a new estate in the plaintiff.

The paper or documentary proof offered by appellee namely appellee's Exhibit 1, Tr., page 22, and Exhibit 2, Tr., page 24, fails to show at the time mentioned in the Bill of Complaint or at any other time or at all, appellant's land was or now is Government land, or a part or parcel of any land of the appellee, and the proof tendered by appellee fails to show that appellant's fence at the time mentioned in the complaint, or at any other time or at all, was or now is upon Government land.

APPELLANT'S PATENT

On the.....day of....., 19..... the appellee issued to Cooper, predecessor in interest of appellant, a patent to the land mentioned in appellant's answer and upon which land appellant built and maintains his fence.

In point of time the Cooper patent antedates Roosevelt's idea or proclamation reserving the forests of these United States for future generations, and prior in time—save perhaps Yellowstone National Park, the patent in this suit antedates the creation of National Parks in the United States.

The only direct proof in this suit bearing upon the true location of appellant's fence and the northwest corner of his land was that of appellant and his witness Bradt and for all purposes of this suit their testi-

mony must be taken as true and stands uncontradicted.

When all the evidence of this suit is considered it cannot be said of the appellant that at the times mentioned in the complaint or at any other time or at all he was or now is a trespasser upon the land of Uncle Sam because the evidence shows he constructed the fence and maintained the same upon land which he claims to be the owner of, and that in the construction of said fence he was guided by the declarations of his predecessors in interest.

In the event that this Court concludes that the fence of the appellant is upon the land of the Government, then in the light of the evidence and in view of the law in this case the only judgment which this Court can render is that the fence in dispute be destroyed and an injunction against its rebuilding be had, as is decided in case of U. S.—Douglas vs. Willan Satoris, 22 Pac. 92, (Wyo.).

In this connection we invite the Court's attention to appellant's testimony at page 43, Tr., wherein he alluded to the northwest corner of his land and its establishment by him in conformity to the declarations of his predecessor in interest and the original field notes upon which the Cooper patent is based and the plaintiff having proven nothing to the contrary we assert the appellant was entitled to a judgment in his favor and we think the rule of law enunciated in the well considered case of Halley vs. Harriman, 183 N. W. 665, applicable to the situation in this suit.

In the Halley case, *supra,* the Supreme Court of Nebraska held: "Where the proper location of

quarter corners of a section of land is disputed and defendant produces evidence tending to show the establishment of such corners by the Government Surveyor at points conforming to the field notes, and plaintiff produces no evidence of their location elsewhere, a verdict for defendant is sustained by the evidence and will not be disturbed."

We think it is proper to remark that the rule of law last aforesaid is so well known to this Court that it does not merit a further discussion.

The patent in this suit can be attacked upon one ground and upon one ground only, and that of fraud in its procurement and by means of this highest muniment of title appellant owns and is in possession of 159.22 acres of land bordering on and touching the shores of the lake which has been referred to interchangably as Sylvan or Silver Lake and the fact that it is a graceful, silvery body of water midst abundant forests and trees may be of great interest to appellee but such fact is a matter of small consequence to the appellant who absolutely needs the water of the lake for watering the livestock on his homestead and for other domestic purposes.

APPELLANT'S ASSIGNMENT OF ERRORS 2, 3, 4, AND 5.

As to our assignments of error, numbers 2, 3, 4, and 5 we purpose discussing them together.

We urge a clear mistake has been made by the trial Judge in his application of the rules of law when the Findings of Fact and Conclusions of Law in this suit

are considered and more in particular that error upon the trial Court's part in holding that, the tract, appellee's Exhibit No. 1, and upon which appellant's patent is based, was conclusive against the appellant in fixing and determining the northwest corner and the boundaries of appellant's land, and we think the true rule of law to be that the map and field notes are a part of the description of appellant's land and insofar as this legal dispute is concerned are depositions.

There is no substantial evidence to justify and support Findings Nos. 5, 6, and 7, which Findings are as follows:

FINDING NO. 5

(Tr., pages 13 and 14)

That the defendant, Marble E. Burch, has erected a fence and other improvements upon the Government land in Lot 1 of Section 2, Township 30 West, Range 7 East M. D. M. between the east shore line of Silver Lake and the east section line of said Section 21 without permit or other authority from the complainant and has been and is now interfering with the construction of the aforesaid road.

FINDING NO. 6

(Tr., page 14)

That the land of the defendant in the NW¼ of Section 1 Township 30 North, Range 7 East, M. D. M., does not touch the shore line or embrace any portion of Silver Lake.

FINDING NO. 7

(Tr., page 14)

That the position of the section line between Sections 1 and 2, Township 30 North, Range 7 East, M. D. M., is as shown on the official plat of survey of said Township and Range approved July 11, 1883, on file in the United States Land Office at Sacramento, California, a copy (46) of said plat being a part of the evidence in this cause.

It is discernable from the foregoing Findings that the trial court assumed as a matter of law that for the purposes of this suit, the official plat, appellee's Exhibit No. 1, was conclusive against appellant in fixing and determining the boundaries of his land and this in utter disregard of the original field notes upon which the plat or map is based and such a conclusion on the part of the trial court we maintain constitutes error.

MAP AND FIELD NOTES CONTROLLING IN FIXING THE BOUNDARIES OF APPELLANT'S LAND.

The original survey and the field notes respecting the same made by Deputy Surveyor George Sandow, in December, 1881, and from which field notes, the map was prepared and upon which the patent is based, are controlling elements in fixing the boundaries of appellant's land.

The much discussed map in this case was prepared in a Surveyor General's Office during the month of July in the year 1883, by a man named Brown the then United States Surveyor General for the State of Cali-

fornia and on this same map is a recital that the same was prepared in strict conformity with the field notes of the survey by Mr. George Sandow.

FIELD NOTES ARE A PART OF THE DESCRIPTION OF APPELLANT'S LAND.

In support of our contention that the field notes are a part of the description of the land called for by the patent and that the Court cannot make a finding in this case without considering the field notes, we cite the following authorities:

In the case of Foss vs. Johnson, 158 Cal. 128, the Supreme Court of this state held: "The reference in the patent to the official plat and survey make the plat and field notes of the survey a part of the description of the land granted as fully as if they were incorporated at length in the patent."

The above rule of law has been followed not only by the courts of this state but those of the United States in the following well considered cases:

Heath vs. Wallace, 138 U. S. 583;
Seward vs. Mallotte, 15 Cal. 306;
Powers vs. Jackson, 50 Cal. 429;
Cragan vs. Powell, 128 U. S. 691—32 L. Ed. 567;
Weaver vs. Howall, 171 Cal. 307;
Wilmon vs. Aros, 191 Cal. 80.

THE LOCATION OF THE NORTHWEST CORNER OF APPELLANT'S LAND A PRINCIPAL ISSUE.

Since one of the principal issues of fact is about the northwest corner of appellant's land and its location is

a vital question herein, we therefore direct the Court's attention to the testimony of the appellant, Marble E. Burch, pages 42 to 46, inclusive, Tr., which testimony in substance is as follows: That he, appellant, is familiar with the land of the Government set forth in the Bill of Complaint and appellant purchased his land from Cooper the patentee mentioned in the patent, Defendant's Exhibit No. A.

That the northwest corner of his land is right on the lake and that the Government intends to build a road between his lot and the lake and that the northwest corner of his land is supposed to be a lost corner.

That his fence is on Section 1, and that the same with reference to Sylvan Lake is on the east and west line to the proportionate corner that his surveyor set in the lake and the fence is between the lines now and is right on the true line and that he built his fence on the east and west line as near as he could build it.

That Cooper, the man from whom he purchased his land, died in 1924, and that defendant built his fence in that year and that he built his fence on the east and west as near as he could to the corner that Mr. Cooper had described and that in building his fence he figured he kept on his side of the line and did not go on Government land.

That when appellant bought the land from Cooper he asked Cooper where the corner was, that is the corner in the lake, and Cooper told him as near as he could and for appellant to go to the outlet of the lake and step ninety steps from the lake and that a big fir snag that stood there and Cooper told him that he could

not miss it and that the corner was practically on an old road.

That it is there—that it had been well established and that appellant would find that corner somewhere near that within just a few feet between the outlet and this old snag.

That Mr. Cooper told him, appellant, that he Cooper had not been up there for several years. Appellant also testified that the old snag was probably burned down, it being the only hole left there with old fir roots in it, and that he found two stumps that correspond very well with the field notes and it looked as though somebody had cut the witness tree down and that he took the two old stumps to be his corner as he, defendant, had the lake edge and the amount of steps and the road to work upon and also the field notes which Mr. Durbin sent him.

That he checked with those field notes and they checked very closely, starting at the corner of thirty-five and thirty-six in the other Township, this being a standard parallel line; he started in and it says this runs twenty-one chains and fifteen links to Sylvan Lake. The field notes read twenty chains and ninety-five links across a trail course and on following that he followed an old blazed line that was there, and is there today, and it corresponded at twenty chains and seventy-five links. That he crossed this old road, and at twenty-two chains and sixty-five links. Appellant also testified, "he said he established a corner of these field notes at twenty-one chains and fifteen links; where-

upon, on my running the line there is right close to where I found the two old stumps, and there is a pile of rocks there, but however, there is nothing left on the, any other trees there, or any rocks, with any marks on them whatever, to identify that corner, and no other place there he could find a corner." That Mr. Cooper told witness appellant, as soon as he got well he would come up and show witness where it was and Mr. Cooper died, and therefore he never showed witness exactly. That Mr. Cooper never did point out the corner on the ground to defendant and the stump testified to is practically right on the end of the neck of the lake. It would be east—northeast out on the land and from Mr. Seebecker's corner practically to the end of the fence—practically north of it.

That he, appellant, built a fence from about 200 yards from the lake on the east and west line and after he built the fence a dispute arose between the forest service and appellant as to his line being between two known corners and he checked that and found that his fence wasn't on the line according to those two corners, and that was over the line a little; so he moved the fence back on to the line between thirty-five and thirty-six, the corner thirty-five on the south side. That he runs cattle and has lived in this vicinity since the Spring of 1924, and uses it as a summer home. That down in the lake maybe 500 yards; the lake was meandered a fence around the lake there or swamp there; it is partly swamp and lake and that did not follow the line of the old fence; the old fence is quite a bit in the middle; just about 80 acres. Sixty acres fenced in of

the 160 acres which he bought and that he ran a fence from it out to the line within 200 yards of Sylvan Lake then he turned and ran straight to Sylvan Lake on that line as near as he could. It is fenced right up to the lake and into the lake a little bit. That Cooper and his boys built the old fence and Cooper's land was not entirely fenced only about 60 acres in the middle and he just ran a fence around a meadow practically in the middle of this square and that he, appellant, bought 159-22 acres.

That the Government made a demand on appellant in 1926 to take these fences down. It may have been in 1925.

That he had experience in surveying quite a little on retracing and he was familiar with surveying for twenty years and knows how to run courses and has a general knowledge of surveying, and has been doing surveying quite a little for twenty years. That his fence is on a true line between thirty-five and thirty-six and the quarter corner on the south side of thirty-five and it is on a line with Mr. Seebecker's survey and appellant's lines correspond with his and that he, witness and appellant, ran the lines with fore and back sight, with a compass. That he, appellant, did not step off ninety paces on getting that line, but got a true line and when he marked his distance up there he measured that correctly and thinks his measurements will check with all the others and he was guided by field notes the same as our other copy.

That he was not educated in surveying and what education he got he picked from the fields, and surveyed for Mr. Sam Stevens, also for Jim Stevens and

many others there. That he can use a transit, but he did not use a transit because he was tracing corners. All he did was to retrace corners and give him a line and testified that the field notes are divided into two sections.

APPELLANTS NORTHWEST CORNER LOST

From the testimony of the appellant Burch it is evident that the Northwest corner of his land is lost and the monuments establishing it cannot be found and in ascertaining the location of lost corners, lines and boundaries, Courts resort to the field notes of the original survey respecting public lands.

T. L. Wright Lumber Co., vs. Ripley County, 270 Mo. 121, 192 S. W. 996.

Even if the original field notes refer to Silver Lake or natural monument as controlling a course or a distance the law only resumes that the monument approaches accuracy within some reasonable distance and places the monument somewhere near where it really exists, but in this respect monuments are not unyielding in matters where boundaries are in dispute.

Security Land and Exploration Co. vs. Burns, 193 U. S. 167, 48 L. Ed. 662.

Monuments generally prevail over courses but courses prevail when monuments would defeat the deed, and the courses and distances enclose the land.

White vs. Luning, 93 U. S. 514, 23 L. Ed. 938.

When the course and distance of one side are missing the known line should be run: corners ascertained and a line run between the ends and closing the land.

McEwen vs. John Den, 24 How. 242, 16 L. Ed. 673.

DUTY OF COURT IF DIFFICULTY IS ENCOUNTERED IN RUNNING THE LINES OF THE SURVEY.

In fixing a lost corner the Court is not confined to the beginning corner of the original survey but can start from any one of the four points hereinbefore named and it is not necessary to follow the calls in the field notes as given, but if the Court can start from any one of the four points, and by doing so harmonize all the calls of the field notes, he may legally do so. In other words, if difficulty is encountered in running the lines of the survey, the Court is at liberty to run them in the reverse direction if it would result in harmonizing all the calls and objects of the patent.

Ayers vs. Watson, 137 U. S. 584, 34 L. Ed. 803.

"Field notes and the plat of Government surveys of record will control in ascertaining locations, even though the monuments established are gone."

Slovensky vs. O'Riley, 233 S. W. 478.

The *field notes* of the survey of public lands *are competent evidence* and have the force of a deposition.

Kirby vs. Lewis, 39 Fed. 67;

U. S. vs. Breward, 10 L. Ed. 916;

U. S. vs. Lowe, 10 L. Ed. 923;

United States vs. Hansen, 10 L. Ed. 937.

The field notes are presumptively correct and are *prima facie* evidence of the facts stated. They must be taken as true until disproved by a clear preponderance of the evidence.

Southern Development Co. vs. Endersen, 200 Fed. 276;

Johnson vs. Morris, 72 Fed. 897.

"The field and description notes of a survey form a part of the survey and are to be considered along with the patent."

Heath vs. Wallace, 34 L. Ed. 1065.

"When the question of a true location of a boundary line arises the field notes should be taken and from the courses and distances, natural monuments or objects and bearing trees described therein, the surveyor should, in order to fix the line precisely as it is called for by the field notes, retrace the steps of the man who made the original survey, and when so located it must control. The line as surveyed and described in the field notes is the description by which the Government sells it land."

County of Yolo vs. Nolan, 144 Cal. 445.

"Natural monuments and found corners, whether right or wrong, control over courses and distances as set forth in the field notes."

Mitchell vs. Hawkins, 189 N. W. 175;

Ogilvie vs. Copeland, 33 N. E. 1085;

Thompson vs. Darr, 298 S. W. 1;

Harrington vs. Boehmer, 134 Cal. 196.

"Where there is a conflict between the map and field notes as to the quantity of land in a patent the field notes control."

Stonewall Phosphate Co. vs. Peyton, 23 So. 440;

Miller vs. Grunsky, 141 Cal. 441;

Kane vs. Otty, 25 Oreg. 531 36 Pac. 537;

State vs. Board of Tide Land Appraisers, 32 Pac. 97.

"Where original monuments indicating corners of a survey have disappeared in absence of

evidence as to a location, plat, field notes and calls therein determine private rights as to disputed boundaries."

Galbraith vs. Parker, 153 Pac. 283.

The appellant in this action is the owner and entitled to possession of Lots 3 and 4 and the south half of the northwest quarter of Section One (1). One of the issues made by the pleadings in this case is—where are the West and North boundary lines of appellant's land? In order to locate and establish them it becomes necessary to resort to the field notes of the original survey of Mr. George Sandow. Deputy Sandow's survey of the Sixth Standard Parallel North, which is the boundary line between Township 30 and Township 31 North, Range 7 East, is the north boundary of defendant's property. His survey subdividing Township 30, more particularly referring to the line running North and South between Section 1 and Section 2 of Township 30 North, Range 7 East, is the West boundary line of defendant's land.

In the Sandow survey we established monuments at the following points:

1. Monument at the section corner of Sections 35 and 36, Township 31.

2. The quarter section corner of Section 35, Township 31 on the Sixth Standard Parallel.

3. The quarter section corner between Section 1 and Section 2 of Township 30.

4. The section corner of Section 1 and Section 2 on the Sixth Standard Parallel in Township 30.

These are the only monuments with which we are concerned, for in determining the location of the North

and West limits of the appellant's land, it is necessary to locate the monument at the section corner of Sections 1 and 2, said monument being on the Sixth Standard Parallel, and referred thereto in the field notes.

The proof introduced on behalf of the defendant bearing upon this point was that of Arthur Bradt, who testified that in surveying the appellant's land he located the following corners.

Corner No. 1. Section corner Sections 35 and 36.

Corner No. 2. Quarter Section corner of Section 35.

Corner No. 3. Quarter Section corner between Sections 1 and 2.

That he did not locate, nor could he find the monuments at the section corner of Sections 1 and 2, Township 30. The latter pont herein referred to as No. 4 is the point in dispute in this action. We therefore must use the monuments above referred to as a starting point by which we are to locate Point No. 4.

In order to picture this matter clearly before the Court we will resort to the use of the capital letter "T" and also the plat and field notes which are exhibits in this case and by means of the letter "T" and the map and field notes we purpose showing the court that the testimony of Bradt is not only pertinent to the issues but that the same does not tend to vary the original survey and was the best evidence before the court upon which a finding could have been made and based; Point No. 1 being the east end of the cross of the "T"; Point No. 2 being the west end of the cross of the "T"; Point No. 3 being the base of the line running north to the

cross of the "T". The point of intersection of that line with the cross of the "T" being the point in question.

Taking Mr. Sandow's field notes with reference to the courses and distances and variations from and to these monuments they are as follows: Starting from Point No. 1 Mr. Sandow ran a course 39.15 chains to a point 152 links north of Point No. 2 from which course he explains in his field notes that he calculated the true location of the line between 1 and 2 as follows: At the start of the line for the first half mile his variation is South 87° 47′ West. His field notes clearly show that he never made a survey of the true line between Points 1 and 2. The survey from points 3 to 4, his field notes call for the intersection of the above referred to cross of the "T" at a point 21.15 chains South 87° 47′ West of corner of Sections 35 and 36 which is referred to herein as Point No. 1. The said line running from Point No. 3 to Point No. 4 is North on true line between Sections 1 and 2 from the one-quarter corner to a point 21.15 chains South 87° 47′ West of the section corner of 35 and 36. Witness Bradt testified that he took the field notes and map of Deputy Sandow, and strictly following them he traced the courses as called for in the field notes and on the map, but he found the distance called for between Points One (1) and Two (2) greater than than that set forth in the field notes. The question then arises, what is the practice and custom governing this situation and what rules of law are applicable thereto?

Witness Bradt testified that in establishing lost corners, surveyors are governed by the rules and regulations of the United States Land Office, which have

been universally followed and adopted by the surveyors and the courts as the proper method for establishing lost corners and that the rule he followed in this case was the rule respecting the proportionate measurement on the location of Point No. 4 being the point in question, and that the rule of proportionate measurement is a rule of ratio as follows, to-wit: the actual distances as measured on the ground, bear to the distances as called for in the field notes, gives the location of the lost monuments. For example, the distances between Points 1 and 2 as actually measured is to the distances between Points 1 and 2, called for in the field notes, as the ratio of the distances called for in the field notes bears to the unknown distances to be determined by calculation. Following this well known rule Mr. Bradt established the closing corner of Section 1 at 21.30 chains South 87° 47′ West of Point No. 1, and in doing so carried out the rule prescribed by the General Land Office pertaining to Restoration of Lost or Obliterated Corners which rule is more fully set forth in that certain Government pamphlet issued by the General Land Office, Washington, D. C., dated July 1 1916 and in this connection we deem it applicable here to quote from Clark on Surveying and Boundaries, Edition of 1922 wherein at Sections 138 and 139 at pages 109 and 110 respectively he says:

Section 138. Re-establishment of meander corners. —In subdivision of sections made fractional by a body of water which was meandered, and along which meandered courses were established the surveyor will frequently find it necessary to re-establish lost or obliter-

ated meander corners. This is not always an easy matter, and, at best, uncertain, in the absence of evidence of those who had known the location of the corner before it was lost. To re-establish such lost corner the surveyor should first carefully chain "at least three of the section lines between known corners of the township within which the lost corner is to be relocated," say the instruction, "in order to establish the proportionate measurement to be used." In retracing such original lines the surveyor should ascertain the real course used by the original surveyor. If such surveyor reported meridianal lines as running due north and it is found that the average course of the three known lines is north 1 degree, and 10 minutes east, this course should be considered in restoring an extinct north line to a meander corner. These preliminary requirements must not be omitted, since they give the only data by which the fractional section line can be measured. "The missing meander corner will be re-established" continue the rules, "on the section or township line retraced in its original location, by proportionate measurement found by the preceding operations, from the nearest known corner on such township or section line, in accordance with the *requirements of the original field-notes or survey.*"

Section 139. Proportionate measurement more reliable than adjustment of chain.—The old practice required the surveyor to adjust his chain to suit the former measure, but recent instructions require the surveyor to pursue the "Proportionate measurement" practice. This will be found more desirable and more

accurate. It is seldom that the recent and former measurements will agree. Such differences occur in a variety of ways, such as using a chain too long or too short; the failure to level up in measuring an incline; by carelessness in setting pins; by failure to measure in a direct line or by an error in entering or transcribing the notes. The surveyor should avoid all of these errors in retracement as in the original survey. "By proportionate measurement of a part of a line is meant," the instructions say, "a measurement having the same ratio to that recorded in the original field-notes for that portion, as the length of the whole line by actual resurvey bears to its length as given in the record."

The following quotations from Tiedeman on Real property Section 832 we deem applicable to the situation confronting us in this case:

> "If therefore, the deed calls for a certain quarter section of a certain section in a certain township, a reference to the maps and field notes of the survey will determine the location of the land, for *maps* and *surveys* are generally proper evidence for the establishment of boundaries."
>
> "But in case of government or public lands as a general rule the Courts and the parties rely generally upon the surveys and plats returned by the Surveyor General for the evidence of boundary, and where the corners are lost, and cannot be established by parol evidence, the surveys and plats only give the courses and distance. If the surveys were accurate, and the courses and distances given in the field notes corresponded exactly with the actual location of the corners, a report to these courses and distances would do complete justice to all of the parties interested in the ascertainment of the boundary. *But as a matter of fact the chains used*

in making the measurements were stretched by constant use so that they were in most cases much longer than the standard chain, thus making the courses and distances call for less land than was actually included within the established corners."

"This statutory provision clearly makes the *field notes* the proper and the best means of ascertaining lost corners and the interpretation of the field notes must be governed largely, if not exclusively by the principles of civil engineering, the object being to ascertain the exact location of a lost corner, it is necessary, and the United States Statutes require it, that the errors in the measurements should be noted. *If, therefore, the courses and distances fall below the actual amount of land included in the two adjacent sections or subdivisions of sections between which the boundary is to be ascertained, the surplus of land should be divided between the two tracts of land in proportion to the respective lengths of their lines in the plats.*"

It therefore follows as a matter of surveying that the appellant's north and west boundary lnes should meet at a point 21.50 chains west of Point No. 1.

The map shows Silver Lake to be in Section 2. If by strictly following the field notes from the known monuments, defendant's boundary line intersected Silver Lake, what would be the legal result?

The trial court took the position that the only property which appellant is entitled to and taking into consideration the patent is that property only as delineated on the map, and that the north and west boundaries of appellant's property are controlled by said map and as a consequence appellant is not entitled to any portion of Silver Lake.

Then what is the position of Silver Lake respecting appellant's west boundary line, as called for by the field notes?

Witness Bradt testified that in surveying the north line of appellant's land and in following the notes and map and using all the courses and distances in strict conformity thereto and with the proportionate corner established by him to-wit: 21.50 chains west of Point No. 1 would be a point extending some 35 links into the Lake from the easterly shore line thereof. Furthermore, from his testimony, if the point was established according to Mr. Sandow's call, 21.15 chains, point No. 4 or the point of dispute would be approximately on the eastern shore line of the lake. Then, taking witness Bradt's statement respecting the disputed corner or point and comparing it to the field notes and the map of Deputy Sandow we direct the Court's attention to the original survey of Deputy Sandow. Deputy Sandow in running north of the true line (and he intersected the east shore of Silver Lake at a point 22.65 chains from Point No. 1 or the section corner of Section 35) notes in his survey that the shore line bears South and Northwest. That the quarter section corner of Section 35 being Point 2 herein is 152 links north of the true corner, and from that random course he calculated the true line. This survey shows that at the Point No. 4 he was actually some 30 or more feet north of the true corner.

It therefore follows that owing to the physical fact that the east bank of Silver Lake bears South and Northwest that if Sandow was on the true line he would

have encountered Silver Lake at a lesser distance from Point No. 1 than 22.65.

Witness Bradt testified that upon a careful examination of the field notes of Deputy Sandow and the map prepared therefrom that the course above mentioned is the only course in which Silver Lake is referred to, and that that line is the only line established by Deputy Sandow that shows the location of any portion of Silver Lake. A close examination of the field notes of Deputy Sandow and a close examination of the map itself will show that his statement is true. It will further reveal the fact that at the time the map was prepared there had never been a survey made of the meandering line of Silver Lake, its length, breadth or any survey showing its approximate shape; and furthermore that there was never a survey made prior to the patent of Cooper showing the location of Silver Lake with reference to the west boundary line of appellant's property. How then did Deputy Surveyor Sandow establish the west line of appellant's property? We are of the opinion that in doing so he adopted the rule discussed in the case of Hiller vs. Emerson, 122 Cal. 573, wherein this Court says: "Where the north line of a Government section is actually run to the northwest corner of the southwest quarter section located, the northwest quarter section corner is located by running a line due north from the northwest corner of the southwest quarter section until it intersects the north line and the point of intersection will be the true northwest corner." The field notes of Deputy Sandow clearly show that he resorted to the close rule in establishing

the west line because from Point No. 3 he ran a true line north to Point No. 4. He did not make a single reference as to any symbols, national monuments, blazed trees, or any call for distance to any intermediate points or point from which the locus of Point 4 might be determined. While Silver Lake was referred to as a natural monument in the survey of the Sixth Standard Parallel, but as to its being a natural monument as to any other point, or as to its being a controlling factor in this case in establishing the west line of defendant's land, there is not any evidence which would tend to show that it could be taken as such. Taking that one reference, how can this court determine its exact location with reference to our west boundary line, without the introduction of other evidence, and from the evidence introduced in the Court below will the same support a finding that Silver Lake was and now is of the size and contour as determined on the map, and by so doing jeopardize the property rights of the defendant?

If this be the law then the court could make a finding that each hill, the course of each stream, and the location of each depression, valley, swamp and lake as depicted on the map, actually exist in the location as shown on the map without any survey or testimony to substantiate their location.

The Court's attention is invited to the case of Harrington vs. Boehmer, 134 Cal. 196. In the Harrington case, *supra,* there was a discrepancy between the field notes and the plat prepared therefrom and the Supreme Court of California held "In case of a discrep-

ancy between the field notes and the plat, the plat must give way to the field notes and the Land Department may properly correct the plat so as to conform to the field notes." It further decided that where the field notes gave certain lands to the defendant and the map showed the title to certain lands to be in the plaintiffs, and the field notes show that there is no such land in existence, as set forth on the map, then the field notes govern and the property belongs to defendant, regardless of what the map depicted.

Even though this court may be of the opinion that the appellant is not entitled to establish his northwest corner by the proportionate measure, nevertheless, his boundaries must strictly conform to the field notes, and he is then nevertheless entitled to such portion of Silver Lake that might be intersected by his west boundary line after said Point No. 4 has been located in accordance with either of the above holdings. As to the location of Silver Lake in strict conformity with the field notes and the map, we are bound thereby insofar as the field notes and the map agree and as to any portion of the map not borne out by the field notes and which does not strictly conform thereto or does depict something not contained in the field notes, we are not bound thereby, nor can appellant's rights be jeopardized by that portion.

Harrington vs. Boehmer, supra.

Witness Bradt testified as to the location of Silver Lake with reference to our West and North boundaries and his testimony is hereinbefore discussed.

In the case of Staiden vs. Helin, 79 N. W. 537,—"The testimony of eye witnesses as to the location of lost corners is admissible for the purpose of proving their location."

Therefore appellant's evidence supports the field notes of Deputy Sandow, together with evidence of matters not referred to in the field notes even though it contradicts the map. And accordingly appellant's boundaries must be run straight between points regardless of their effect on Silver Lake, and furthermore the survey upon which the map is based did not even refer to the location of Silver Lake, in connection with the establishing of appellant's west boundary line.

In conclusion the main question before this Court is, whether the map often alluded to herein is conclusive against the appellant respecting the boundaries of his land. The Judge who presided at the trial of this case in the Lower Court assumed for all purposes and decisive of all the issues framed by the pleadings that the map was the best evidence. However, we urge that he was wrong in the assumption and that his findings and decree are against law for all the reasons hereinbefore argued and cannot be reconciled with the authorities which hold that the map and field notes are depositions in this case and part of the description of appellant's land.

We respectfully urge that the decree in this suit should be reversed.

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